No. 236.

CRANE & CO., TOPEKA.

Brief of Evans & Low, for P.

Filed Feb. 15, 1899.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*
vs.
E. H. STURM, *Defendant in Error.*
} No. 236.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT
FOR PLAINTIFF IN ERROR.

STATEMENT.

THE plaintiff in error contends that the State courts in the case at bar denied the defendant below a right, privilege and immunity to which it was entitled under the Federal Constitution, which provides that—

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

And the act of Congress of May 26th, 1790, which, after prescribing the forms of authentication, enacts:

"And the said records and judicial proceedings so authenticated, shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

The facts on which this contention is based are as follows:

On the 18th day of January, 1894, E. H. Sturm, a citizen of Kansas, defendant in error, commenced this action against the plaintiff in error before a justice of the peace in the county of Republic, State of Kansas, to recover the sum of $140, which he claims was due him for services rendered by him to plaintiff in error during the years 1893 and 1894, in said State. On the 5th day of February, 1894, he recovered judgment in said cause before the justice of the peace for the sum of $110 and costs of suit against plaintiff in error. The railway company by proper proceedings appealed the case to the district court of said county of Republic, a transcript of the proceedings before the justice of the peace having been filed in the district court on the 12th day of March, 1894. Prior to the commencement of this action, and on the 13th day of December, 1893, one A. H. Willard, a citizen of the State of Iowa, brought an action be-

fore a justice of the peace in Pottawattamie county, Iowa, against E. H. Sturm, the defendant in error herein, and in said action sued out an attachment and garnished the plaintiff in error herein as a debtor of said Sturm. At all times in question the plaintiff in error in this action and the garnishee in said Iowa action was a corporation organized and existing under and by virtue of the laws of Illinois and Iowa, and owned and operated a railroad extending from the city of Chicago, in said State of Illinois, into and through the States of Iowa, Missouri, Kansas, Nebraska, and Colorado, and was, at all of said times, a citizen of said State of Iowa. On the 18th day of December, 1893, which was some time prior to the commencement of the case at bar, the plaintiff in error herein filed its answer as garnishee in said cause brought in the Iowa court as aforesaid, admitting that it was indebted to Sturm in the sum of $77.17. On motion of the plaintiff therein, Willard, the action pending in Iowa was continued until February 20, 1894, when it was shown therein that Sturm was a non-resident of Iowa, and it was thereupon ordered by the court that notice of the pendency of said action be given the defendant Sturm by publication, which was done. On January 15th, 1894, and before the commencement of the action in Kansas, an alias writ of attachment was issued in the action brought

in Iowa and served on the garnishee therein, the plaintiff in error herein. At the time of the service of the second writ of attachment, as just stated, the railway company was indebted to Sturm in the sum of $110, it being the same indebtedness sued for in Kansas. On the 20th day of February, 1894, a judgment was rendered in the Iowa action against the Railway Company, the garnishee, condemning the sum of $95.17 of the amount due Sturm from the Railway Company and sued for in the Kansas case, to the payment of the amount due Willard from Sturm. From said judgment, the Railway Company, the garnishee, appealed to the district court of said county of Pottawattamie, in said State of Iowa, where said action was pending when the case at bar was tried in the district court of Republic county, Kansas. Sturm was notified of the commencement and pendency of the action in Iowa before it was tried, and of the garnishment proceedings, in ample time to protect his rights therein. He employed an attorney, and sent him to Iowa to look after the case, but for some reason the attorney made no appearance in the Iowa case. This is shown by the following evidence of Sturm given upon the trial of the Kansas case:

"Q. When were you first notified of the garnishment — in Iowa? A. It was in December, 1893.[1]

. . . . . .

[1] Record, 31.

"Q. Did you employ anybody to look after your case over in Iowa? A. Yes, sir.

"Q. Who was it? A. Mr. Cooper.

"Q. Who was Mr. Cooper? A. He is a lawyer that lives in Fairbury.

"Q. Did Mr. Cooper go over to Council Bluffs to appear for you there? A. Yes, sir."

The railway company, at the proper time, pleaded and proved in the Kansas case the commencement and pendency of the action brought in Iowa and the garnishment proceeding and the judgment therein as a defense to the claim of the defendant in error herein. It also asked, by a motion in writing, to which was attached a properly authenticated copy of the judgment and proceedings in the Iowa case, that the case at bar be continued until the disposition of the case in the Iowa court. The court overruled the motion, and refused to continue the case. On the trial the plaintiff in error introduced in evidence a duly authenticated copy of the proceedings and judgment in the Iowa case, but the court refused to give them any faith or credit, and rendered judgment against the plaintiff in error herein for the sum of $110 and costs of suit, $95.17 of which amount had previously been condemned by the judgment and proceedings in the Iowa case, as already stated. In rendering the judgment, the court said:

"I will say in this case, as I did in the other, that except for the Sharitt case, it would seem that the defense

set up by the defendant would be good — that is, that its garnishment in Iowa should be a defense to an action against it here; and although, as the Minnesota court says, that decisions seem to be contrary to the authorities (even its own former decision), yet it appears to be the decision of our Supreme Court, and, being such, it is my duty to follow it, although it seems to work a hardship — that is, to hold that if you owe money here and go into an adjoining State you can there be compelled by legal proceedings to pay it to my creditors there, and then when you return here, to also pay it to me. If that is the law, it is time it were known. It certainly contradicts the old saw, 'that you can't have your cake and eat it.' Both States ought not to compel defendant to pay, even though the debt be exempt here. One payment should be enough. The main question in the case is, Which State has the better right to compel payment? In view of the Sharitt decision, and that the question ought to be settled, and that if the defendant does not take the case up it won't go, the decision of this court is against the defendant and for the plaintiff in the sum agreed upon, to wit, $110.00, with interest from this date at 6 per cent."[1]

The plaintiff in error then took the case to the Kansas Court of Appeals, where the judgment of the District Court was affirmed. The judgment of the Kansas Court of Appeals was afterwards affirmed by the Supreme Court of Kansas.

[1] Record, 50.

SPECIFICATION OF ERRORS.

Said plaintiff in error says that in the record and proceedings of said Supreme Court of the State of Kansas in said cause, there is manifest error in this:

1. That said court erred in affirming the judgment of the Kansas Court of Appeals.

2. That said court erred in refusing and failing to give full faith and credit to the judgment and judicial proceedings of the courts of the State of Iowa in the case of A. H. Willard, plaintiff, v. E. H. Sturm, defendant, and The Chicago, Rock Island & Pacific Railway Company, garnishee.

3. That said court refused to give any faith or credit to the judgment and judicial proceedings of the courts of the State of Iowa in the case of A. H. Willard, plaintiff, v. E. H. Sturm, defendant, and The Chicago, Rock Island & Pacific Railway Company, garnishee.

4. That said court violated § 1 of Art. IV of the Constitution of the United States.

5. That said court violated § 905 of the Revised Statutes of the United States, which provides that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence said records are or shall be taken."

6. That said court erred in refusing to give to the judgment and judicial proceedings of the courts of the State of Iowa in the case of A. H. Willard, plaintiff, v. E. H. Sturm, defendant, and The Chicago, Rock Island & Pacific Railway Company, garnishee, such faith and credit as such judgment and judicial proceedings have by law and usage in the courts of the State of Iowa.

ARGUMENT.

The plaintiff in error, being a citizen of the State of Iowa, and owning and operating a railroad therein, is amenable to its laws and is bound by, and is required to conform to all orders and judgments of its courts.

Before the commencement of the case at bar, the plaintiff in error in the case brought in Iowa was "attached as garnishee and . . . notified and required not to pay any debt due" by it to the defendant in error, Sturm, "or thereafter to become due him," and to retain in its possession all of the property of said Sturm "now or hereafter being in" the possession, custody or control of the plaintiff in error.[1] This attachment and garnishment was valid and binding on the Railway Company, and was authorized by § 2851 of the statutes of Iowa, which reads as follows:

"SECTION 2851. (*Petition must state.*)—The petition which asks an attachment must in all cases be sworn to. It must state:

"1. That the defendant is a foreign corporation, or acting as such; or,

"2. That he is a non-resident of the State."[2]

[1] Record, 20, 21, 22.

[2] Record, 47.

Debts due to a defendant in that State are attached in the following manner:

"SECTION 2967. Debts due the defendant, or property of his held by third persons and which cannot be found, or the title to which is doubtful, are attached by garnishment thereof."[1]

"SECTION 2975. (As amended by ch. 58, 18th G. A.) (*How affected.*) — The attachment by garnishment is affected by informing the supposed debtor or person holding the property, that he is attached as garnishee, and by leaving with him a written notice to the effect that he is required not to pay any debt due by him to the defendant, or thereafter to become due, and that he must retain possession of all property of the said defendant then, or thereafter, being in his custody or under his control, in order that the same may be dealt with according to law, and the sheriff shall summon such persons as garnishees as the plaintiff may direct. But no judgment shall be entered in any garnishment proceeding condemning the property or debt in the hands of the garnishee until the principal defendant shall have had ten days' notice of such proceedings. If the case is pending in the district or circuit court, the notice shall be served in the same manner as original notices are required to be served. If the case is pending before a justice of the peace, the defendant shall have at least five days' notice of such proceedings, if he be a resident of the county; otherwise service of such notice may be made by posting the same in three public places in the township."[2]

Service by publication of the defendant Sturm in the Iowa case was authorized by § 2616 of the Revised Code

[1] Record, 47.

[2] Record, 46.

of Iowa of 1888, which, so far as it is material, is as follows:

"SECTION 2618. Service may be made by publication when an affidavit is filed and personal service cannot be made on the defendant within this State, in either of the following cases:

. . . . . .

"5. In actions brought against a non-resident of this State."[1]

The undisputed evidence in the case at bar shows that the statutes of Iowa were complied with in every way in the Iowa case, and that the justice of the peace and the district court in that case had jurisdiction of Willard, the plaintiff therein, and of the garnishee the Railway Company, the plaintiff in error herein. The opinion of the Supreme Court of Kansas in the case at bar is as follows:

"*Per Curiam:*

"The facts in these cases clearly bring them within the ruling in *Missouri Pacific Ry. Co. v. Sharitt*, 43 Kan. 375, and for the reasons stated by Mr. Justice Valentine in that case the judgment in these cases will be affirmed."[1]

The facts in the Sharitt case referred to in the opinion just quoted are as follows:

Sharitt, a citizen and resident of Kansas, while in the employ of the Missouri Pacific Railway Company, during the month of June, 1887, "earned and became and was entitled to receive from" said company the sum of $79. On the 13th day of July, 1887, at St. Louis, Missouri, the

[1] Record, 48.

[1] Record, 59.

Missouri Pacific Railway Company "was garnished by and before a justice of the peace of that State, at the suit of J. P. Stewart, a resident of Missouri, against Sharitt, and ordered to answer therein, which it did on the 28th day of July, 1887, and on the 29th day of September, 1887, it was ordered to pay into that court the amount so due from it to said Sharitt. On the 27th day of July, 1887, Sharitt brought an action in Kansas against the Railway Company to recover the amount of his wages, to which the defendant anwered by setting up the garnishment proceedings in the Missouri court in the case brought by Stewart.

The Supreme Court held in the Kansas case, in an opinion by Mr. Justice VALENTINE, from which Mr. Chief Justice HORTON dissented, that because Sharitt was a citizen of the State of Kansas, and earned the money in that State, the Missouri court could not, by publication of a notice to Sharitt, without personal service on him, obtain jurisdiction of the indebtedness due Sharitt from the Railway Company, and that therefore the action in the Missouri court was void and no defense to the action brought in Kansas by Sharitt. In that case Mr. Justice VALENTINE said:

"It will be seen from what has been said, that my concurrence in the decision in this case is founded almost wholly upon the theory that the Missouri court had no jurisdiction of Sharitt, or of anything belonging or appertaining to him, and therefore that there can be no such thing

as *lis pendens* by virtue of the Missouri proceeding with regard to the subject-matter of this action, which is the debt, and nothing in the Missouri proceeding then can be considered as valid or binding as against Sharitt. . . . But, not wishing to be misunderstood in this case, I will be a little more explicit as to some matters. I think that the Missouri court has jurisdiction of Stewart, the plaintiff in the Missouri action, and of the railway company, the garnishee; and that any judgment or order which might be rendered or made by the Missouri court as against Stewart or the railway company would be valid and binding as against them."

From this it is apparent that the judgment in the case at bar was rendered upon the theory that the Iowa court did not and could not obtain jurisdiction over the indebtedness due Sturm from the Railway Company, without personal service upon Sturm.

The evidence showed, and the fact was not denied, that the judgment and garnishment proceedings in Iowa were valid under the laws of that State, and would have been a perfect and complete defense to any action which Sturm might have brought in that State to recover his wages from the plaintiff in error.[1]

The court in the case at bar refused to give any force or effect to the judgment and garnishment proceedings in the Iowa case, which were pleaded and proven upon the trial, and violated § 1 of Art. 4 of the Federal Constitution, which provides that "Full faith and credit shall be

[1] Mooney v. R. Co., 60 Ia. 316; Moore v. C. R. I. & P. Ry. Co., 44 Ia. 385; Willard v. C. R. I. & P. Ry. Co., 96 Ia. 555.

given in each State to the public acts, records and judicial proceedings of every other State," as well as the act of Congress above referred to. This question cannot be taken out of the case, or the right of the plaintiff in error to have it considered by this court defeated, by the failure of the State court to make any reference to it in its opinion.[1]

Under the decisions of this court it is well settled that the faith and credit spoken of in the Constitution and statute are not limited to the form of the record, and are not satisfied by its introduction in evidence upon the trial. It is the duty of the court not only to admit it in evidence when properly authenticated, but to give it "Full faith and credit," and "such faith and credit . . . as they have by law or usage in the courts of the State from whence said records are or shall be taken."[2]

This section of the Constitution and the act of Congress were and are intended to cover cases of the character of the one at bar. It was assumed by the framers of the Constitution, and Congress, that the garnishment and attachment procedure of the different States would be different, and that the procedure in some States, if measured by the laws of other States, would be held invalid and of no force.

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[1] Green v. Van Buskirk, 5 Wall. 307; 7 id. 139;
Crapo v. Kelly, 16 Wall. 610;
Carpenter v. Strange, 141 U. S. 87, 103;
Columbia Water Power Co. v. Columbia St. Ry. L. & P. Co., 19 Sup. Court Rep. 249, 252;
Cole v. Cunningham, 133 U. S. 107.

[2] Crapo v. Kelly, 16 Wall. 610, 619.

Mr. Justice MILLER, in speaking for this court on this question, used the following language:

"Another consequence is that the debtor of a non-resident may be sued by a garnishee process, or by a foreign attachment, as it is sometimes called, and be compelled to pay the debt to some one having a demand against his creditors; but if he can be caught in some other State, he may be made to pay the debt again to some person who had an assignment of it of which he was ignorant when he was attached. The article of the Constitution and the act of Congress relied on by the plaintiff in error, if not expressly designed for such cases as these, find in them occasions for their most beneficent operation."[1]

This court, in considering that case on the merits, through Mr. Justice DAVIS, said —

"that the Supreme Court of New York necessarily decided *what* effect attachment proceedings in Illinois had by the law and usage in that State; and as it decided against *the* effect that Green claimed from them, this court had jurisdiction under the clause of the Constitution which declares that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings in every other State' and the act of Congress of 1790, which gives to those proceedings the same faith and credit in other States that they have in the State in which they were rendered. This decision, supported as it was by reason and authority left for consideration on the hearing of the case, the inquiry whether the Supreme Court of New York did give to the attachment proceedings in Illinois, the same effect they would have received in the courts of that State."[2]

[1] Green v. Van Buskirk, 5 Wall. 307, 314.

[2] 7 Wall 139.

The decision of the U. S. Circuit Court of Appeals, Seventh Circuit, in the case of *Mooney v. Buford and George Mfg. Co.*[1] is applicable at this time. In that case the court said:

"If, in the ordinary case of foreign attachment, there can be rendered against a resident debtor a judgment in garnishment which, under the general principles of international law and the Constitution of the United States, the courts everywhere will respect as valid, there can be no objection, in reason or principle, to a like judgment against a foreign corporation, which, by law and by its own consent, has become subject to the service of process in the State where sued, as if chartered or incorporated there. In both cases, alike, there is due process of law; and, if in the State courts, the proceedings and the judgments, it is provided by act of Congress (Rev. St., § 905), 'Shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the State from which they are taken;' or, as it is declared in section 1, art. 4, of the Federal Constitution, 'Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.'"

The position of the Railway Company in the case at bar is much stronger than was that of the garnishee in the case just quoted from, for the reason that the plaintiff in error herein was a corporation and a citizen of Iowa, the State in which the judgment in the garnishment proceeding was rendered.

"There is no doubt," says the Supreme Court of Missouri, "that under the provisions of Article IV, Section 1,

[1] 72 Fed. Rep. 32, 39.

of the Constitution of the United States, full faith and credit must be accorded the public acts, records and judicial proceedings of a sister State; and had the debt in this instance been condemned by a court of competent jurisdiction in the State of Iowa, in a proceeding which is, or is equivalent to, a proceeding *in rem*, there can exist no doubt that a judgment thus rendered could not be contested in this State by a party to the record in Iowa claiming the debt or property."[1]

In a case on all fours with the one at bar, ROTHROCK, J., in speaking for the Supreme Court of Iowa, said:

"Further, it seems to us that the rule established in that case ignores the fact that the proceedings in garnishment were entitled to full faith and credit as a judgment of a sister State; and that being proceedings *in rem*, and the debt being condemned by a court having jurisdiction, the judgment cannot be contested in another State by a party to the record claiming the property."[2]

The court in the Iowa case did obtain jurisdiction over the indebtedness due from the garnishee therein to Sturm. There is a marked distinction between the attachment of personal property and the garnishment of an indebtedness. In order to effect an attachment of property, the property must be found and seized within the State where it is visible and tangible, and, therefore, has its situs wherever seized, but this is impossible in the case of garnishment, as a debt is invisible and intangible and its situs must be wherever the debtor — the garnishee — is served. While

[1] Howland v. C. R. I. & P. Ry. Co., 134 Mo. 474, 480.

[2] Moore v. C. R. I. & P. Ry. Co., 43 Iowa, 385, 388.

the garnishment of a debt is often called a mode of attachment, yet it does not operate as a specific lien upon any property of the garnishee or of the defendant, such as is acquired by the actual seizure of property.

The effect of the judgment in garnishment is merely to determine the existence and amount of a debt, to substitute the plaintiff for the defendant, as the person to whom it is payable and to require payment by the garnishee.[1]

A debt or a chose in action cannot, therefore, have a physical location or situs.

In referring to this question the Supreme Court of Rhode Island said:

"Now, it is evident that a chose in action, being an intangible chattel, cannot, strictly speaking, have a physical location. Its locus or situs is, therefore, a legal fiction, and, being so, it may have a different situs for different purposes; that is, a conventional situs. Thus, the situs thereof for the purposes of taxation is the domicile of the creditor or payee of the debt. For the purposes of administration, so far as the non-resident creditor is concerned, it is also at his domicile. But, so far as the remedy of the creditors of the payee of the debt is concerned, the authorities are very uniformly to the effect that the situs of the debt is at the domicile of the debtor, and *that wherever the creditor might maintain a suit to recover the debt, there it may be attached as his property, provided the laws of the forum authorize it;* or, as said by Shiras, J., in *Mason v. Beebe*, 44 Fed. 559, 'The situs of the property for the purpose of jurisdiction is one thing, and its situs for the pur-

[1] Cross v. Brown, (R. I.) 33 Atl. 144, 156; Hall v. Mandlin, (Minn.) 59 N. W. Rep. 985.

pose of determining the right of the parties thereto is another, and the two are not necessarily the same.'"[1]

The court in the Iowa case obtained jurisdiction of the indebtedness due Sturm from the Railway Company by the garnishment of the latter. On the commencement of that action no judgment was asked against the Railway Company. It was only notified not to pay or deliver to Sturm any debt or property due or belonging to him. Now, if that notice was not sufficient to reach the debt, in what manner did it or could it affect the garnishee? As the only purpose in serving the summons on the garnishee was to notify it not to pay money due to Sturm, it cannot be that the court had any jurisdiction or power to compel the garnishee to pay or surrender any property or debt over which the court had no jurisdiction. This being true, by the service of the garnishment summons on the Railway Company, the court obtained jurisdiction over the debt due Sturm from the Railway Company, the plaintiff in error.

A case directly in point is that of *Mooney v. Buford & George Mfg. Co.*, *supra*, decided by the U. S. Circuit Court of Appeals. In that case the court said:

"But, manifestly, the essentials of jurisdiction cannot rest upon a fiction, and if, in this class of cases, the situs of a debt or chose in action is essential, it must be the real situs. . . . No such fiction, however, is necessary, because the jurisdiction in such a case does not depend

[1] Cross v. Brown, supra.

upon the situs of the debt, but upon control over the debtor, obtained by means of due process, duly served. Even if, as in cases of domestic attachment, the creditor and the situs of the debt be within the State, effective jurisdiction in garnishment can be acquired only by the service of process upon the debtor. It is notice to the debtor that gives the plaintiff in garnishment a lien upon the debt, or an assignment of it; and, once that is accomplished, notice by publication or in such manner as may have been provided by statute, may be given to the principal defendant, upon which the court may proceed to final judgment, disposing of the debt as effectually as, upon like notice by publication, it may dispose of a chattel seized in attachment. . . . No court can rightfully disregard the lien upon the debt which is established by service of process in garnishment upon the debtor. For the purpose of taxation, debts belong, of course, to the creditors to whom they are payable, and follow their domicile, wherever that may be. . . . But when it is a question of garnishment, or of the administration of an estate consisting of credits, resort must be had to a forum which can reach the debtor. The obligation is in him, and can be enforced for the benefit of the plaintiff in attachment only by proceedings against him, wherever the evidence of the debt may be held."

Mr. Justice Brewer, in speaking for the Supreme Court of Kansas on this question, said:

"A mere debt is transitory, and may be enforced wherever the debtor or his property can be found, and if a creditor can enforce collection of his debt in the courts of this State, a creditor of such creditor should have equal facilities."[1]

[1] B. & M. R. R. R. Co. v. Thompson, 31 Kas. 180, 195.

Mr. Justice PECKHAM, in speaking for the Court of Appeals of New York, in *Guillander v. Howe*,[1] points out very clearly the distinction in this respect between debts and movables, consisting of tangible property, and says:

"This court has recognized the distinction as to a situs, between debts and movables. The latter being capable of having a situs, not the former, as they follow the domicile of the owner."

In *Coskie v. Webster*,[2] Mr. Justice GREER made a like distinction, and remarked:

"A debt is a mere incorporeal right. It has no situs, and follows the person of the creditor."

The same rule is stated very clearly by the United States Circuit Court in the case of *Connor v. Hanover Insurance Company*.[3] In that case the plaintiff procured insurance of the defendant upon a building situated in the State of Michigan, of which State she was a resident. The defendant, the Insurance Company, was organized under the laws of New York, and had its principal place of business in the city of New York, but it transacted an insurance business in Michigan, Illinois, and other States of the Union. A loss covered by the policy, having occurred, it was adjusted, and soon thereafter the claim against the insurance company was assigned by the plaintiff to the parties for whose use the action was brought. Prior to the loss the plaintiff had become indebted to a certain citizen

[1] 135 N. Y. 657, 661.
[2] 2 Wall. Jr. 131.
[3] 28 Fed. Rep. 549.

of the State of Illinois, residing at Chicago, who immediately after the occurrence of the fire, and before the loss was adjusted, commenced suit by attachment against plaintiff and garnished the insurance company in the State of Illinois. The garnishment process was properly served upon the garnishee, but no service of the principal writ was had upon the defendant, except by publication. The insurance company pleaded as a defense to the action brought in Michigan, the pendency of the action in Illinois and the garnishment proceedings therein. The court held that the garnishment proceeding in the State of Illinois was a complete defense to the action brought in Michigan.

Equally as strong is the following language of the Supreme Court of Vermont:

"It is true that the trustee process is sometimes called 'attaching a debt,' because it creates a lien upon the debt as attachment does upon personal property. But the validity of the two kinds of lien rests on wholly different grounds. Attachment of personal property must be by taking possession of it,—but no possession can be taken of a debt. To make the lien valid against the debt, all that is required is notice to the debtor (the trustee) of the suit—a mere summons."[1]

The same principle was stated by this court in the case of *Cole v. Cunningham et al.*[2] That was an action brought in Massachusetts by Cunningham and Tolman, assignees

[1] Cahoon v. Morgan et al., 38 Vt. 236.

[2] 133 U. S. 107.

of one Bird, against Butler, Hayden & Co., to enjoin the latter from prosecuting two actions brought by them (in the name of Fayerweather) in New York against Bird, in which Claflin & Co. (residents of New York) had been garnished as debtors of Bird. The parties to the injunction suit in Massachusetts were all residents of that State. The defendants in the action brought in Massachusetts had commenced the suit in New York against Bird, and had caused Claflin & Co. to be garnished as Bird's debtors. Although personal service was not obtained against Bird in the New York cases, the Supreme Court of Massachusetts and this court held that the injunction was properly allowed in the Massachusetts case. Neither of the courts held that the garnishment proceedings in New York were invalid, or that the New York court did not, by the garnishment proceedings, obtain jurisdiction over the indebtedness due Bird from Claflin & Co. On the contrary, the decision of the Massachusetts Supreme Court, and of this court, was predicated of the fact that the garnishment proceedings in the New York cases were valid, and gave the court in those cases jurisdiction over the subject-matter of the action,—the money due Bird from Claflin & Co.

In that case this court said:

"Nothing can be plainer, than that the act of Butler, Hayden & Co. in causing the property of the insolvent debtors to be attached in a foreign jurisdiction, tended directly to defeat the operation of the insolvent law in its

most essential features, and it is not easy to understand why such acts could not be restrained, within the practice to which we have referred."

If the court in New York by the garnishment proceeding did not obtain jurisdiction of the indebtedness due Bird from Claflin & Co. without personal service upon Bird, as counsel for defendant in error in the case at bar contends, in what manner could those proceedings tend to defeat the insolvent laws of Massachusetts? In other words, how could void proceedings in the courts of New York affect the law or proceedings in the courts of Massachusetts? The validity of the proceeding in the New York cases, and the fact that the court by the garnishment proceedings obtained jurisdiction of the amount due Bird from Claflin & Co., was the foundation of the action brought in Massachusetts.

In that case, Mr. Justice MILLER, in referring to the principle for which we contend, and about which there was no dispute, said:

"Indeed, it is *not questioned* in the very learned opinion of the court in this case, that if Butler, Hayden & Co. had been permitted to go on with their proceeding in New York, they would have secured an order in the court in which the proceedings were pending, that the garnishee, Aaron Claflin & Co., should pay the amount of their indebtedness to the plaintiff in that action. . . .

"The record introduced from the court of New York in this case had the effect, in that State, to give Butler, Hayden & Co. a lien on the indebtedness of Aaron Claflin

& Co. to their creditor, Bird, which in that court would have ripened into a judgment and been enforced."

This proposition was not denied by the court in that case, but it was in effect admitted, for the judgment of the lower court granting the injunction was affirmed for the reason that if the defendants were permitted to prosecute to judgment the actions in New York, the result would be that the insolvent laws of Massachusetts would thereby be defeated.

That case was decided on the ground on which all such actions are allowed, which has been well stated, as follows:

"On the contrary, the case proceeds on the ground that the defendants, if allowed to proceed with their action, will perfect a lien which is now inchoate under their attachment, and will thereby establish a *valid* title to the property of the insolvent debtors under the laws of Pennsylvania."[1]

The case brought in the Iowa court against Sturm and the plaintiff in error as garnishee has been taken to and decided by the Supreme Court of that State since the trial of the case at bar in the district court.[2] In that case the Supreme Court said:

"From the time of the commencement of this action and the service of the notice of garnishment, the wages due and owing Sturm by the railway company were, to all intents and purposes, in the justice court, or, at least, sub-

[1] Dehon v. Foster et al., 4 Allen, 545, 551.

[2] Willard v. Sturm et al., 96 Iow 555.

ject to its jurisdiction. This jurisdiction could not be defeated by Sturm's action in the Kansas courts, taken after plaintiff had commenced his suit in this State. It is said, however, that, if this judgment is allowed to stand, the garnishee may be compelled to pay its debt twice. This is, no doubt, true, and it is certainly unfortunate, but it is no reason for relaxing well-settled rules of law. The court of this State first obtained jurisdiction, and must retain it to the end."

The rule is now well settled that the court in the Iowa case obtained jurisdiction over the indebtedness due from the Railway Company to Sturm by the service of the garnishment summons or notice upon the garnishee and the publication of notice to Sturm.[1]

This being true, the judgment and garnishment proceedings in the Iowa case are a complete defense to the case at bar. If they are not, the plaintiff in error will be compelled to pay its debt twice,—once in Iowa to the creditors of Sturm, and also in Kansas to Sturm himself. Such a hardship could not be imposed on the plaintiff in error, as it is not contended that there was any fraud in the Iowa judgment or proceedings, or that there was any collusion between the plaintiff in error and Willard.

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[1] Nat'l Fire Ins. Co. v. Chambers et al., 32 Atl. Rep. 663, 669;
Hdw. Mfg. Co. v. Lang & Co., 127 Mo. 242, 246;
Howland v. C. R. I. & P. Ry. Co., 134 id. 474;
Harvey v. Great Northern R. Co., 50 Minn. 405;
Mooney v. R. Co., 63 Iowa, 345;
Neufelder v. German Am. Ins. Co., (Wash.) 33 Pac. Rep. 870;
R. Co. v. Crane, 102 Ill. 249;
Newland v. Circuit Judge, 85 Mich. 151;
Carson v. R. Co., 88 Tenn. 646;
Mashassuch Felt Mills v. Blanding, 17 R. I. 297;
R. Co. v. Tyson, 48 Ga. 467;
Ins. Co. v. Woodworth, 111 U. S. 138.

"Nothing can be more clearly just," says Chancellor Kent, "than that a person who has been compelled by a competent jurisdiction to pay a debt once should not be compelled to pay it over again. It has, accordingly, been a settled and acknowledged principle, in the English courts, that where a debt has been recovered of the debtor, under this process of foreign attachment, in any English colony, or in these United States, the recovery is a protection, in England, to a garnishee against his original debtor, and he may plead it in bar. (*Chevalier, Assignee of Dormer, v. Lynch*, Doug. 170; *Cleve v. Mills*, Cooke's B. L. 243; *Allen v. Dundas*, 3 Term Rep. 125; and see also a recognition of the principle in 4 Term Rep. 187; 1 H. Bl. 669, 671, 683; 2 H. Bl. 408, 410.)

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"If, then, the defendant would have been protected under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle will support a plea in abatement of an attachment pending, and commenced prior to the present suit. The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt binding upon the defendant; and which the courts all over our governments, if they recognize such proceedings at all, cannot fail to regard. '*Qui prior est tempore potior est jure.*' . . . If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice; for we may reasonably presume that, if the priority of the attachment in Maryland be ascertained, the courts in that State would not suffer that proceeding to be defeated by the subsequent act of the defendant going

abroad and subjecting himself to a suit and recovery here."[1]

In the case of *Harvey v. Great Northern Ry. Co.*[2] the court said:

"The pendency of a prior action by foreign attachment in another jurisdiction, which binds the debt, may *always* be set up by way of defense to a suit by the defendant in the attachment to recover the same debt. This constitutes an exception to the general rule that *lis pendens* in a foreign court is not a good plea. An attachment is in the nature of proceedings *in rem*, the *res* being the debt or other property attached, and the *lis pendens* in such proceedings, before the tribunals of another jurisdiction, is held to be a good plea in abatement of a suit. This rule is essential to prevent a collision in the jurisdiction of courts, as well as for the protection of a party summoned as garnishee or trustee, who might otherwise, without any fault of his own, be in danger of being compelled to pay the same debt twice. *Embree v. Hanna, supra; Wallace v. McConnell*, 13 Pet. 136; *Bank v. Rollins*, 99 Mass. 313; *Railroad Co. v. May*, 25 Ohio St. 347; 2 Kent Com. 122. We have examined all the cases cited by plaintiff's counsel, and none of them, in our opinion, sustain his contention."

We respectfully submit that the judgment of the Supreme Court of Kansas should be reversed.

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[1] 5 Johns. 101. | [2] 52 N. W. Rep. 906.